FILED
AUG 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1645 *vide* 06-11

IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,

Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONERS

Respondents' brief erroneously asserts that there is no conflict between the Fifth Circuit's holding on the equal protection issue in this case and the Fourth Circuit's holding on the same issue in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), *aff'd sub nom., Toll v. Moreno*, 458 U.S. 1 (1982). The two courts resolved in diametrically opposite ways the question whether discriminations against nonpermanent resident aliens are subject to strict scrutiny under the Equal Protection Clause.

Respondents do not even attempt to dispute that there is a direct conflict between the Fifth Circuit's holding concerning the Supremacy Clause and the decision of the highest court of Vermont in *Dingemans v. Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989). It is, moreover, apparent even from Respondents' brief that this case presents issues of great public and constitutional importance concerning whether states can discriminate against aliens lawfully present in the United States. The Court should grant the petition for a writ of certiorari.

I. THE EQUAL PROTECTION QUESTION SHOULD BE REVIEWED BY THIS COURT.

1. Respondents assert that the Fourth Circuit's holding in the *Moreno* case does not conflict with the Fifth Circuit's decision on the equal protection issue because the Fourth Circuit's *per curiam* decision did not contain a discussion of the issue. Opp. at 15-16. In fact, the Fourth Circuit was reviewing a detailed and thorough district court opinion that examined the very question at issue here—whether strict scrutiny should apply to state classifications that discriminate against nonpermanent resident aliens. 489 F. Supp. 658 (D. Md. 1980). The Fourth Circuit expressly adopted this holding as its own, by first noting with approval that the district court had

applied strict scrutiny, and then concluding that "[f]or reasons sufficiently stated in this opinion of the district court, we agree that the University's ... policy ... is invalid under the Constitution." 645 F.2d at 220.

Respondents' suggestion that *Moreno* is distinguishable because it involved "uniquely situated G-4 visaholders" (Opp. at 15) is likewise wrong. In fact, the district court in *Moreno* considered and rejected the same argument that Respondents advanced below; namely, that "the previous Supreme Court cases concerning discrimination against aliens in which a strict scrutiny test was applied all involved a statute or practice which allegedly discriminated against resident aliens (a term equated by the defendant with immigrant alien)." 489 F. Supp. at 660. Moreover, the supposedly "unique" character of the G-4 visaholder—the ability to have "dual intent" and thereby seek to reside permanently in the United States—is also true of H-1B visaholders like Petitioners, as explained in point 2 below.

2. The Fifth Circuit's decision to apply rational basis review also conflicts with this Court's decisions in *In re Griffiths*, 413 U.S. 717 (1973), *Graham v. Richardson*, 403 U.S. 365 (1971), and *Nyquist v. Mauclet*, 432 U.S. 1 (1977)—all of which adopted strict scrutiny review with respect to discriminations against aliens—for the reasons set forth in the Petition (at 5-11). Respondents' attempts to argue that there is no conflict with these decisions lack merit.

First, Respondents allege that H-1B visaholders (such as Petitioners) must have "no intention of abandoning" their foreign residences, and for this reason supposedly do not merit the strict scrutiny applied in *Griffiths*. Opp. at 5. This contention is wrong as a matter of federal immigration law: H-1B visas are "dual intent" visas; their holders may "lawfully seek to become a permanent resident of the United States." 8 C.F.R.

§ 214.2(h)(16)(i) (2006); *see also* 8 U.S.C. § 1101(a)(15)(M). This contention is also wrong as a matter of interpretation of the Court's jurisprudence: in *Griffiths* the Court specifically noted that Mrs. Griffiths had not renounced her Dutch citizenship. *See* 413 U.S. at 718 n.1.

Second, Respondents advance the flawed argument that the different "tax liability and military service" of temporary visaholders takes them outside of the Court's holding in *Griffiths* and its progeny. Opp. at 14. This argument is wrong as a matter of law because it fails to comprehend the basis for the application of strict scrutiny in the first instance: to protect "discrete and insular" minorities from discrimination on the basis of their status as such a minority. *See Graham*, 403 U.S. at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)). The reason the Court applied strict scrutiny in *Griffiths* was not because Mrs. Griffiths would be likely to serve in the military, but because she and other aliens were members of a powerless minority, easily subject to discrimination. Nonpermanent resident aliens are, if anything, even more powerless, and thus at even greater risk of discrimination, than are permanent visaholding aliens.

Respondents' argument is also wrong as a matter of fact because nonpermanent visaholders like Petitioners *do* pay taxes (both state and federal) and *can* enlist or be conscripted into the military. *See* 26 U.S.C. § 7701 (nonpermanent visaholders pay federal income taxes when they have "substantial presence" in the United States); La. Rev. Stat. Ann. 47:31(1) (requiring all persons "present in the state for more than six months in any given year" to pay state income tax); 10 U.S.C. § 504(b)(2) (granting the Secretary of Defense power to authorize the enlistment of temporary visaholders).

It is evident that nonpermanent visaholders, including Petitioners, contribute in a myriad of ways to our society; these contributions cannot be shunted aside or

ignored by labeling them "temporary" or "tenuous." Ms. Maw has lived in Louisiana since 1999 and her current visa does not expire until March 2009. Ms. Wallace arrived in New Orleans in 2002 and her current visa runs through 2007.* The fact that both Petitioners have remained in New Orleans after Hurricane Katrina, and continue to seek to assist indigent criminal defendants, eloquently demonstrates that they "contribute in myriad other ways to our society" such that state classifications discriminating against them solely on the basis of their status as aliens should be analyzed under strict scrutiny. *In re Griffiths*, 413 U.S. at 722.

3. Respondents contend that "[t]his Court has never held that the Constitution requires a State to license as an attorney a nonimmigrant alien." Opp. at 3. Of course, that is not the relief Petitioners seek: they will qualify for a license to practice law based on their academic records and the bar examination, as well as on their moral character and fitness. Here, they seek only the ability to have their credentials weighed along with all other applicants to the Louisiana Bar, and not to be summarily excluded on the basis of their status as aliens.

4. Respondents' justification for precluding nonpermanent residents from bar membership is so speculative and airy that they do not even contend that it would satisfy the strict scrutiny test or *any* form of heightened scrutiny. They hypothesize that Petitioners and other nonpermanent aliens might leave the country and be "beyond the reach of the judicial system," and that a sudden departure might prejudice the judicial process Opp. at 21 n.59, 23. This fear is not supported by reference to any actual experience in Louisiana, which until recent

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* Ms. Wallace recently married a U.S. citizen and is in the process of applying for permanent residency—a process that can take a year or more to complete.

years permitted nonpermanent visaholding aliens to be members of the bar, nor in any of the other states where such aliens are members of the bar. The fact is that nonpermanent visaholders do not pose realistic practical problems. Any lawyer, whether citizen or alien, may leave the state or the profession for any number of reasons, and there is no reason to think that Petitioners or other visaholders (who can become members of the bar only by demonstrating good character) will be disruptive or will fail to make adequate arrangements for clients if and when they leave the state. Moreover, even if they leave, the bar would retain the right to take disciplinarian measures, including disbarment if that were appropriate.

5. The equal protection question presented by this petition has divided the Fourth and Fifth Circuits, and sharply divided even the Fifth Circuit itself, as evidenced by the fact that the panel decision was 2-1 and that seven of the fifteen judges in the circuit voted to rehear the panel's decision in order to reverse it. The Court should grant the petition to resolve the conflict.

II. THE PREEMPTION QUESTION SHOULD BE REVIEWED BY THIS COURT.

1. Respondents do not address at all the Supreme Court of Vermont's decision in *Dingemans*, which invalidated a state bar rule, like the Louisiana Rule at issue here, that categorically prohibited an H-1B visaholder from becoming a member of the bar under the Supremacy Clause because the rule "impose[d] a burden on the federal immigration program that could not have been intended by Congress." 568 A.2d at 357 (citation omitted). There is a direct conflict between this decision and the Fifth Circuit's holding below; the Court should grant certiorari to resolve it.

2. Respondents contend that "petitioners do not point out any 'actual conflict' between the Bar Admission Rules and the laws of the United States." Opp. at 26. As

Dingemans held, however, the conflict arises because the federal law that permits aliens to seek and attain H-1B visas to engage in the practice of law necessarily contemplates that state governing authorities will not categorically prevent them from obtaining the requisite license. *See* 568 A.2d at 356-57.

3. Respondents also posit that there is no Supremacy Clause problem because petitioners can work in the "legal field" even though they cannot obtain a license to practice law. Opp. at 27. That statement is akin to an argument that the petitioner in *Takahashi* could have worked in the "fishing field" by piloting a boat, even though he was not allowed to fish, and that therefore the state law prohibiting him from obtaining a fishing license on the basis of his alien status was not preempted by federal immigration law. Of course, this Court did not so hold in invalidating that comparably discriminatory measure under the Supremacy Clause. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) (emphasizing the "tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants ... from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization").

4. Respondents also argue that licensure of attorneys is traditionally a function left to the states, but the argument has no relevance here. States unquestionably possess wide authority to regulate lawyers, but the issue here is not the nature or scope of the regulation, but rather whether the state can impose special restrictions on lawful resident aliens that are not imposed on citizens.

III. THIS CASE PRESENTS IMPORTANT PUBLIC AND CONSTITUTIONAL QUESTIONS.

Although Petitioners and Respondents disagree as to the appropriate outcome of this case, it is clear that the constitutional questions presented herein are of great importance and are not limited in scope to the particular wording of Louisiana Bar Rule 3(B). As Respondents point out, other States could discriminate against nonpermanent visaholders with respect to bar admissions and other licensing regimes if the decision below is permitted to stand. *See, e.g.*, Opp. at 12 n.35, 17 n.46, 18 n.49, 26 n.69. The fact that the decision below will have "far reaching consequences," App. 78a, for future application of both the Equal Protection and Supremacy Clauses—as further discussed in the *amici* briefs—is an additional consideration militating in favor of granting the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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